SUPREME COURT, U. S

FILED

APR 21 1975

MICHAEL RODAK, JR., CLE

No. 74-1321

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

EDDO H. FEYEN, JR.,

Petitioner,

v.

AMERICAN MAIL LINE LTD.,
a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

GARRY KAHN
RAYMOND J. CONBOY
POZZI, WILSON & ATCHISON
808 Standard Plaza
Portland, Oregon 97204
Attorneys for Petitioner

SUBJECT INDEX

	Page
Petition for Writ of Certiorari to the Supreme Court of the State of Oregon	1
Opinions Below	1
Jurisdiction	3
Question Presented	3
Statutes	3
Statement of the Case	6
Proceedings Below	10
Reasons for Granting the Writ	18
Conclusion	27
Appendix A	29
Appendix B	42

TABLE OF AUTHORITIES

CASES

	Page
Gutierrez v. Waterman Steamship Corp., 373 US 206 (1963)	26
Hagans v. Ellerman and Bucknall Steamship Co., 318 F2d 563 (CA3, 1963)	26
Hopson v. Texaco, Inc., 383 US 262 (1966)	3,11, 16,18, 19,22, 24,25, 26,27
Kyzar v Vale Do Ri Doce Navegacai, S. A. 464 F2d 285 (CA5, 1972)	23,24
Seas Shipping Co. v. Sieracki, 328 US 85 (1946)	26
Sinkler v. Missouri Pacific Railroad Co., 356 US 326 (1958)	21,22, 24
Thompson v. Calmar Steamship Corp., 216 F Supp 324 (E.D.Pa 1963) aff'd 331 F2d 657 (CA3, 1964)	26
Tim v. American President Lines, Ltd., 409 F2d 385 (CA9, 1969)	23,26
Usner v. Luckenbach Overseas Corp., 400 US 494 (1974)	24

TABLE OF AUTHORITIES (Cont.)
STATUTES

	Page
28 USC §1257(3)	3
28 USC §1333	5
33 USC §901	25
45 USC §51	4,19
46 USC §688	3,19, 23

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

EDDO H. FEYEN, JR.,

Petitioner,

v.

AMERICAN MAIL LINE LTD.,
a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

The petitioner prays that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of Oregon entered in this case on January 23, 1975.

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Judgment of the Circuit Court of the State of Oregon for Multnomah County, signed and filed on August 1, 1973, which

have not been officially reported, are appended to this Petition as "Appendix B".

The decision of the Oregon Supreme Court, filed on January 23, 1975, is appended to this Petition as "Appendix A". The decision is reported at 75 Oregon Advance Sheets 255.

On February 19, 1975, the Supreme Court of the State of Oregon, upon motion of Petitioner "* * * allowed the [Petitioner's] motion for an order staying the issuance of the mandate in the case and retaining the record in the Supreme Court for the purpose of possible review by the United States Supreme Court." Counsel were notified of this action of the Oregon Supreme Court by letter dated February 19, 1975, over the signature of J. David Gernant, legal counsel for the Oregon Supreme Court, pursuant to the practice of that Court.

JURISDICTION

The decision of the Oregon Supreme Court was filed on January 23, 1975. The jurisdiction of this Court is invoked under 28 USCA §1257(3).

QUESTION PRESENTED

Whether a longshoreman, whose negligence while engaged in loading cargo aboard a vessel in a foreign port causes injury to a member of the crew, is an agent of the vessel within the purview of Hopson v. Texaco, Inc., 383 US 262 (1966) so as to impose liability upon the vessel owner for injury to the crew member under the Jones Act, 46 USC §688.

STATUTES

The Jones Act, 46 USCA §688 (June 5, 1920, Ch. 250, §33, 41 Stat. 1007):

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying

or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The Federal Employers' Liability Act, 45 USC §51 (April 22, 1908, C. 149, §1, 35 Stat. 65; Aug. 11, 1939, C. 685, §1, 53 Stat. 1404):

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia or any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be

liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

The Judiciary Act, 28 USC §1333 (As amended May 24, 1949, Ch. 139, §79, 63 Stat. 101):

"The District Court shall have original jurisdiction, exclusive of the courts of the states, of:

(1) Any civil suit of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States in all proceedings for the condemnation of property taken as prize."

STATEMENT OF THE CASE

The Petitioner, a 38 year old seaman, was employed aboard the vessel KOREAN MAIL as third mate. The KOREAN MAIL is owned and operated by the respondent American Mail Line, Ltd. (Ab. 31, 33). The vessel docked at the port of Keelung, Taiwan, on September 14, 1971, and Feyen was injured on the following day at 8:30 p.m. (Tr. 34, 35).

Petitioner was one of the officers in charge of the watch at Keelung. Chinese longshoremen were employed in loading and

discharging cargo. While no one testified who employed the longshoremen, it is undisputed that officers in charge of the watch supervised their work on board the vessel (Tr. 24-26). Most of the longshoremen did not speak English, and Petitioner communicated with them through a Chinese stevedore foreman who was able to speak the language (Tr. 25, 26).

When Petitioner turned out to stand watch at 8:00 p.m. on September 14, 1971 (Tr. 24, 35), the Chinese longshore gangs were securing cargo in the No. 2 and 3 hatches. "Securing cargo" refers to shoring and lashing the cargo so that it will not shift in transport (Tr. 35-38). As officer in charge of the watch, Petitioner supervised the loading of the cargo (Tr. 24, 37, 38). After performing various duties he walked on the weather deck to the aft

end of the No. 2 hatch to see how the work of securing cargo was progressing (Tr. 39, 40) The hatch cover was open, so that Petitioner could look into the intermediate decks below (Tr. 28-31).

The hatch cover at the No. 2 hatch is of the "MacGregor" type. When the hatch is opened, the hatch covers fold up by hydraulically powered machinery into "pleated" sections, like an accordion (Tr. 29-30; Pl. Ex. 2, 7). The hatch covers are operated from a control box on an elevated mast table at the aft end of the hatch (Tr. 53, 54; Pl. Ex. 1, 4, 8). The operator of the controls does not have a full view of the hatch opening unless he leans over the rail of the mast table (Tr. 53; Pl. Ex. 1).

Petitioner stood a few inches forward of the aft end of the hatch and

looked into the hatch to observe the longshoremen working below (Tr. 40, 41). He saw no one on the main deck in the vicinity of the hatch nor was anyone visible in the mast house area (Tr. 41). He had been watching the operation below for less than 15 seconds with his right hand on the hatch coaming, when, without any warning, the hatch cover began to close, wedging Petitioner's hand between the hatch coaming and the hatch cover roller (Tr. 40-45; Pl. Ex. 1). Petitioner screamed, and a Chinese longshoreman suddenly appeared from behind the controls on the mast house and looked at Petitioner over the rail (Tr. 45, 46). Petitioner motioned for the longshoreman to open the hatch and the longshoreman was able to get the hatch cover raised again (Tr. 46, 47). Petitioner had not approved the completion of the

work at the hatch, and had given no instructions or permission for anyone to close the hatch (Tr. 43).

PROCEEDINGS BELOW

The case was tried below upon counts of unseaworthiness and negligence. The trial court found that the vessel was unseaworthy and that the defendant was negligent. The Supreme Court of the State of Oregon held that, as a matter of law, the vessel was not unseaworthy, and that the defendant was not negligent. Petitioner does not agree with the decision of the Oregon Supreme Court on the issue of unseaworthiness. However, that issue presents a close factual question, of no general legal significance, and Petitioner does not press the issue here. However, the ruling of the Oregon Supreme Court that the vessel owner was not negligent deprives seamen of the protection guaranteed

them by this Court in Hopson v. Texaco, Inc., 383 US 282 (1966), and, if allowed to stand, means that a seaman injured in a foreign port cannot recover for the negligence of anyone other than a fellow member of the ship's company, even though the individual causing injury is working aboard the vessel in the ship's service under the direction of the crew.

On March 28, 1972, Petitioner filed in the circuit court of the State of Oregon for Multnomah County an amended complaint setting forth allegations of unseaworthiness and negligence. The amended complaint alleged the following acts of negligence:

> "At said time and place the defendant [American Mail Line, Ltd.] was careless and negligent in one or more of the following particulars:
>
> (1) In failing to warn plaintiff of the intent to move the hatch covers while plaintiff was standing at the

No 2 hatch.

(2) In allowing the hatch covers to be moved while plaintiff was standing at the No. 2 hatch with his hand in the area where the hatch covers would be moved.

* * * * *

(4) In failing to have the hatch covers in a locked position so as to prevent them from being moved while plaintiff was in the area of the No. 2 hatch where they were to be moved.

(5) In failing to provide written instructions in the control box so that the operator could understand what button or buttons to push in order to activate the top deck hatch covers."

On April 6, 1972, the defendant filed an "Answer to First Amended Complaint", denying negligence and alleging that the Petitioner was contributorily negligent in various particulars. On the following day, Petitioner filed a reply denying the affirmative allegations of the answer.

The action was tried to the Circuit Court for Multnomah County, Honorable Philip

J. Roth, Judge, sitting without a jury, on June 27 and June 28, 1973. On August 3, 1973, the circuit court signed and entered formal Findings of Fact, Conclusions of Law and Judgment. The findings of fact on the negligence issue are as follows:

"IV.

> At the time and place the plaintiff was injured, the defendant failed to warn plaintiff of the intent to move the hatch covers while plaintiff was standing at the No. 2 hatch, allowed the hatch covers to be moved while plaintiff was standing at the No. 2 hatch with his hand in the area where the hatch covers would be moved, failed to have the hatch covers in a locked position so as to prevent them from being moved while plaintiff was in the area of the No. 2 hatch where they were to be moved and failed to provide written instructions in the control box so that the operator could understand what button or levers to use in order to activate the top deck hatch covers."

The circuit court entered a conclusion of law that defendant "* * * was negligent in at least one or all of the

respects alleged in paragraph IV of the Findings of Fact" and entered judgment for damages in favor of petitioner.

On August 3, 1973, Respondent filed a timely Notice of Appeal to the Supreme Court of the State of Oregon from the judgment of the circuit court, and thereafter timely prepared and filed an "Appellant's Brief and Abstract of Record", containing an argument in support of the proposition that "No evidence supports findings that defendant was negligent in failing to warn plaintiff, or in having the locks locked or in not having written instructions at the control box." (Appellant's Brief p.22).

Thereafter, Petitioner prepared and timely filed in the Supreme Court a "Respondent's Brief", answering the shipowner's contentions on negligence as follows:

"Contrary to the position of the shipowner, the Chinese longshoremen employed aboard the vessel were, as a matter of law, agents of the shipowner and their negligence is imputable to the shipowner. Hopson v. Texaco, Inc., 383 US 262, 86 S Ct 765, 15 L Ed2d 740 (1966). There was undisputed evidence that the Chinese longshoreman who closed the hatch on plaintiff's hand failed to give a warning of his intent to close the hatch, and closed the cover while plaintiff had his hand on the hatch coaming. Under such circumstances, the defendant was negligent as a matter of law. Olah v. SS Jaladurga 343 F2d 457 (CA4, 1965). There was also evidence that the defendant was negligent in failing to have the hatch cover locked in a locked position, and in failing to have instructions in the Chinese language upon the control box." (Respondent's Brief, p. 13).

* * * * *

"The shipowner's brief is based upon the unspoken premise that the vessel owner was not liable, on the basis of respondeat superior, for the acts of the Chinese longshoremen. However, the negligent acts of the longshoremen are, as a matter of law, imputed to the shipowner. Hopson v. Texaco, Inc., 383 US 262, 86 S Ct 765, 15 L Ed2d 740 (1966); Carter v. Union Railroad Company, 438 F2d 208 (CA3, 1970)." (Respondent's Brief, p. 24).

Petitioner's brief before the Oregon Supreme Court then went on to discuss and quote at length from Hopson.

The decision of the Oregon Supreme Court held against Petitioner on the issue of the vessel's responsibility for acts of the Chinese longshoremen. The opinion of the Supreme Court is attached to this Petition as Appendix A. However, relevant portions of the opinion are also set forth below:

> "Plaintiff also charged that the defendant was negligent in closing the hatch cover when plaintiff had his hand on the coaming and in failing to warn plaintiff. The trial court found that defendant was negligent in these respects. Plaintiff's contentions are based upon the proposition that the longshoreman who started to close the hatch cover was an employee of the ship and, therefore, the ship is liable for this negligence.
>
> Plaintiff has not cited any cases in which a court held longshoremen were employees of the ship and the

ship was liable because of the longshoreman's negligence. We have found none and the cases to which we have been referred are to the contrary. Tim v. American President Lines, Ltd., 409 F2d 385 (9th Cir 1969); Kyzar v. Vale Do Ri Doce Navegacai, S.A., supra (464 F2d at 289).

Tim v. American President Lines, Ltd., supra (409 F2d at 388), distinguished the case plaintiff is relying upon, Hopson v. Texaco, Inc., 383 US 262, 86 S Ct 765 15 L Ed2d 740 (1966). In the Hopson case, seamen became ill in a foreign port and could not continue the voyage. The master procured a cab to transport the seamen to the office of the United States Consul as was required of him by law. The taxi driver drove negligently and injured or killed his seamen passengers. The United States Supreme Court held that the ship was liable for the taxi driver's negligence. The Court emphasized that the master selected the driver and, therefore, the ship was liable for the negligence of the driver it chose. In Tim, as here, there was no evidence the ship selected the stevedoring contractor who employed the longshoremen; therefore, the court in Tim held that the ship was not responsible for the negligence of the longshoremen."

REASONS FOR GRANTING THE WRIT

This petition presents an important issue of federal law under the Jones Act which the Supreme Court of the State of Oregon has decided in a way contrary to the holding of this Court in Hopson v. Texaco, Inc., 383 US 262 (1966) or, if not contrary to the precise holding of that case, in a way so alien to the spirit of the decision as to justify this Court's review of the decision on writ of certiorari. The decision of the Oregon Supreme Court holds, in effect, that seamen injured in foreign ports by persons other than fellow crew members who, however, are employed aboard the vessel in the ship's service under the direction of the crew, are without any remedy against the shipowner in the courts of the United States, but must instead pursue their claims for injury in China or Peru, relying upon

such rights as the laws of those and other far-off nations choose to give them.

As a member of the crew of the vessel SS KOREAN MAIL, Petitioner's action was based in part upon the defendant's negligence under the Jones Act, 46 USC §688. The Jones Act incorporates the standards of the Federal Employees Liability Act, as amended, which renders an employer liable to its employees for any injuries resulting in whole or in part from the negligence of its "officers, agents or employees" (45 USC §51). In Hopson v. Texaco, Inc., supra, two members of the crew of a Texaco tanker fell ill. In order to discharge an incapacitated seaman in a foreign port, federal law requires that he be taken to the United States Consul for repatriation. The ship's master hired a taxicab to take the men to the consul's

office at Port of Spain, 38 miles distant from the dock. Enroute,the taxi collided with a truck, killing the master and one seaman, and injuring the other seaman. This Court held (Mr. Justice Harlan, dissenting that the taxi driver must be considered an agent or employee of the vessel for purposes of the Jones Act, reasoning:

> "These seamen were in the service of the ship and the ill-fated journey to Port of Spain was a vital part of the ship's total operation. The ship could not sail with these two men, nor could it lawfully discharge them without taking them to the United States Consul. * * * Getting these two seamen to the United States Consul's office was, therefore, the duty of respondent. And it was respondent - not the seamen - which selected, as it had done many times before, the taxi service. Respondent - the law says - should bear the responsibility for the negligence of the driver which it chose. This is so, because, as we said in Sinkler [Sinkler v. Missouri Pacific Railroad Co., 356 US 326 (1958)], 'justice demands that one who gives

> his labor to the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuit, will conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered.' 356 US at 330, 2 L Ed2d at 803."

In Sinkler v. Missouri Pacific Railroad Co., supra, 356 US 326 (1958), this Court had held (Justices Harlan and Frankfurter dissenting) that a railroad employee could recover damages against his own employer for injury caused by the negligence of a second railroad engaged in switching operations. The Court observed "* * * substantial authority in common-law decisions supported recovery by the railroad employee from his employer for injuries caused by the fault of employees of an independent contractor performing a part of the employer's railroad operations", but held that, in interpreting the FELA, the Court "need not

depend upon common-law principles of liability", and that, while "* * * engaged in switching and handling respondent's cars and trains about the terminal area, the Belt Railway employees on the job were, for purposes of the FELA, as much as part of the respondent's total enterprise as was the petitioner while engaged in his regular work on the respondent's car."

Hopson applies Sinkler in a maritime context, and with even more reason. A railway employee, injured through the negligence of an independent contractor, generally will have a common-law negligence action (albeit not under the FELA) against the independent contractor, which he can with some convenience pursue in this country in a state or federal court. But a seaman, injured in a distant port, is not so fortunately circumstanced. If an American railway employee injured through the negligence of

an independent contractor, has a cause of action against his own employer under the FELA, the Jones Act surely does not require an American seaman, injured abroad through the negligence of an independent contractor engaged in the service of the vessel, to pursue his claim in the courts of Vladivostok, Shanghai, Da Nang or Port Said, in reliance upon whatever brand of justice may be dispensed under legal systems alien to ours. Nor does Hopson, which the Oregon Supreme Court has misconstrued, require him to do so.

In distinguishing Hopson, the Oregon Supreme Court relied upon Tim v. American President Lines, Ltd., 409 F2d 385 (CA9, 1969) and Kyzar v. Vale Do Ri Doce Navegacai, S. A., 464 F2d 285 (CA5, 1972). Tim does indeed hold that a seaman cannot recover against the vessel owner for the

negligent operation of a gantry crane by a longshoreman employed by an independent contracting stevedore company. The vessel was being loaded in this country with Government cargo and the United States rather than the shipowner therefore hired the stevedore. The Ninth Circuit held that the longshoreman crane operator was not an agent of the vessel within the test of Sinkler or Hopson because the vessel owner did not select the stevedore. Tim did not seek certiorari. The decision of the Ninth Circuit appears to misconstrue Hopson and Sinkler.

Kyzar was an action by a longshoreman based upon unseaworthiness. The shipowner contended that plaintiff's injury was caused by the "operational negligence" of a fellow longshoreman within the purview of Usner v. Luckenbach Overseas Corp., 400 US 494 (1974). The Fifth Circuit held that an

instruction on this issue was an incorrect statement of law. The facts are not comparable to ours, nor does the decision of the Fifth Circuit address itself to Hopson. The Oregon Supreme Court appears, however, to confuse the remedies of Jones Act seamen with those of longshoremen, a faulty analogy since the rights of the latter are entwined with problems created by the exclusive remedy provisions of the Longshoremens' and Harbor Workers' Compensation Act, 33 USC §901 et seq.

The Oregon Supreme Court considered it significant that "there was no evidence that the ship selected the stevedoring contractor who employed the [Chinese] longshoreman." It is undisputed, however, that the Chinese longshoremen were employed about the vessel under the actual direction and supervision of the ship's officers, and that

they were engaged in the ship's service. A longshoreman, even though employed by an independent contracting stevedore is, as a matter of law, engaged in the service of the vessel and plays a "vital part of the ship's total operation". Gutierrez v. Waterman Steamship Corp., 373 US 206 (1963); Seas Shipping Co. v. Sieracki, 328 US 85 (1946); Thompson v. Calmar Steamship Corp., 216 F Supp 324 (E.D. Pa 1963), aff'd 331 F2d 657 (CA3, 1964); Hagans v. Ellerman and Bucknall Steamship Co., 318 F2d 563, 571 (CA3, 1963).

The decision of the Oregon Supreme Court, following hard upon the heels of Tim v. American President Lines, eviscerates the protection given to seamen by this Court's nearly unanimous decision in Hopson.

CONCLUSION

For the reasons set forth in this Petition, the Court should grant certiorari for the purpose of reaffirming Hopson v. Texaco, Inc.

Respectfully submitted,

GARRY KAHN
RAYMOND J. CONBOY
POZZI, WILSON & ATCHISON
Attorneys for Petitioner
Eddo H. Feyen, Jr.

APPENDIX "A"

IN THE SUPREME COURT OF THE
STATE OF OREGON
In Banc

Eddo H. Feyen, Jr.,

Respondent,

v.

American Mail Line, Ltd.,
a corporation,

Defendant.

Appeal from Circuit Court
Multnomah County

Philip J. Roth, Judge.

Argued and submitted February 7, 1974.

William F. White, Portland, argued the cause for appellant. With him on the briefs were White, Sutherland, Parks & Heath, Portland.

Raymond J. Conboy, Portland, argued the cause for respondent. With him on the brief were Pozzi, Wilson & Atchison and Garry Kahn, Portland.

DENECKE, J.

Reversed with instructions.

DENECKE, J.

The plaintiff was a mate on the vessel "Korean Mail" operated by the defendant. The plaintiff suffered an injury while working on the ship and filed this action. The trial court, sitting without a jury, found for the plaintiff. The defendant appeals.

The plaintiff was injured when a hatch cover closed on his hand. The hatch covers on the ship operate hydraulically. When they are fully opened they are automatically locked and cannot be closed. To close the hatch covers the locks first must be manually released. After the locks are released several controls located in a control panel must be operated. The control panel is located on the right side of the vessel on what is described as a mast table. The mast table is immediately to the rear of

the No. 2 hatch opening and elevated about five or six feet above the hatch opening.

The ship took on cargo in Taiwan. Chinese longshoremen did the loading. They spoke no English and communicated with the ship's personnel through a stevedore foreman.

When the plaintiff came on watch, the officer whom he relieved told him that longshoremen were finishing the loading of the No. 2 hatch. Plaintiff's duties included inspection of the loading when the longshorement were finished. If he approved the loading he would order the hatch cover closed. Normally, the plaintiff would have a longshoreman close the hatch under plaintiff's supervision.

About 8:30 p.m. the plaintiff came to the left rear side of the No. 2 hatch. It was after dark and the ship's lights were on. He saw no one on the deck or near the hatch cover controls. The plaintiff looked

into the hatch and saw men working. Plaintiff rested his hand on the top of the hatch coaming or frame a few inches from the open hatch cover. Without warning the hatch cover started closing and rolled over plaintiff's hand. The plaintiff screamed and a Chinese longshoreman appeared from behind the control panel. The plaintiff gestured and the longshoreman opened the hatch.

Plaintiff charged the defendant both with breach of warranty of the ship's seaworthiness and with negligence. One specification of both charges was that the defendant failed to have the hatch covers in a locked position to prevent them from being moved while plaintiff was in the area of the hatch.

The trial court found that defendant did fail to have the hatch cover in a locked position. The trial court con-

cluded that the vessel was unseaworthy in this respect.

We conclude that the only inference that can be drawn is that the hatch cover locks were unlocked in the process of closing the hatch cover. This inference is compelled because four separate operations must be made to start the closing of the hatch cover. First, the hatch cover locks on the main deck must be manually unlocked; then, one must press a button on the control panel to actuate the hydraulic system. Next, the operator must open the applicable bypass valves. Lastly, he turns the control lever to close the hatch. The only inference is that a longshoreman intentionally commenced closing the hatch cover. That anyone could inadvertently close the hatch cover would be too unlikely a coincidence to consider. And it should be noted that although the act

of closing the hatch cover does involve a series of necessary but arguably separate and independent steps or acts, such independence is without relevance.

The next question is, was an unseaworthy condition created when the longshoreman unlocked the hatch covers and commenced closing the hatch.

This case is within admiralty and maritime jurisdiction; therefore, federal law governs. Hahn v. Ross Island Sand & Gravel Co., 214 Or 1, 8-9, 320 P2d 668, cert granted 356 US 972, 78 S Ct 1137, 2 L Ed2d 1146, revs'd 358 US 272, 79 S Ct 266, 3 L Ed2d 292 (1958), rehr den 359 US 921, 79 S Ct 577, 3 L Ed2d 583 (1959). A ship operator has a duty to furnish a seaworthy vessel; that is, "to furnish a vessel and appurtenances reasonably fit for their intended use." Mitchell v. Trawler Racer, 362 US 539, 550, 80 S Ct 926, 4 L Ed2d 941 (1960. A seaman

injured because of the ship operator's failure to provide a seaworthy vessel has a right of recovery against the ship and its operator.

A temporary condition which prevents a ship from being reasonably fit for its intended use, although it arises after the commencement of the voyage, renders the ship unseaworthy in that respect. Mitchell v. Trawler Racer, supra (362 US 539). The Trawler Racer was a fishing vessel. Slime and fish gurry left from unloading operations remained on the ship's rail. Because of the presence of this refuse, the plaintiff slipped on the rail while disembarking the ship. A majority of the Court held that the condition of the rail could be found to render the ship unseaworthy. It held that it was immaterial whether the ship owners knew or should have known about the condition since unseaworthiness is not based upon negligence.

On the other hand, when the injury

is not caused by a condition of the ship, but by "the isolated, personal negligent act of the petitioner's fellow longshoreman," the ship is not thereby rendered unseaworthy. Usner v. Luckenbach Overseas Corp., 400 US 494, 500, 91 S Ct 514, rehr den 401 US 1015, 91 S Ct 1247, 28 L Ed2d 552 (1971). In Usner, a winch operator lowered a sling too fast and the sling struck a longshoreman. The court held this did not create an unseaworthy condition.

The lower federal courts have had difficulty in verbalizing and applying this distinction. For example, Kyzar v. Vale Do Ri Doce Navegacai, S. A., 464 F2d 285 (5th Cir 1972). We interpret the federal cases to hold that if a negligent act creates a condition which exists for a period of time or if there is a series of similar negligent acts which create an unsafe condition, and such condition causes an injury, the ship is thereby rendered

unseaworthy. However, if there is but one negligent act and that causes an injury close in point of time to the negligent act, the ship is not thereby rendered unseaworthy.

We find the facts in this case to be of the latter category. The longshoreman negligently commenced to close the hatch cover since he either failed to ascertain whether it was safe to do so or failed to give a proper warning. This conduct immediately caused plaintiff injury. However, the negligence of a longshoreman without more does not establish the liability of the shipowner.

The Fifth Circuit, which has struggled more with defining Usner than any other circuit, reached this same conclusion when confronted with similar facts. In Robinson v. Showa Kaiun K. K., 451 F2d 688 (5th Cir 1971), plaintiff was injured when a hatch cover was opened rather than closed

as in the instant case. The stevedore opened the hatch cover by pushing it with a scoop bucket attached to a crane. The plaintiff longshoreman was standing on the hatch cover. The crane operator, without any warning to the plaintiff, pushed the hatch cover with the bucket and caused plaintiff to lose his balance. The court held:

> " * * * The push of the bucket in this case was an 'isolated, personal negligent act' of the appellant's fellow longshoreman. That act did not render unseaworthy an otherwise seaworthy vessel under the Usner doctrine, and the judgment of the trial court is affirmed."[1]
> 451 F2d at 690.

Plaintiff charged and the trial court found the ship was unseaworthy because it had no written instructions on the control box so that the operator would know how to activate the hatch covers. This failure could not be a cause of the plaintiff's injury. As

we previously stated, we are of the opinion that the only inference that can be drawn is that a longshoreman intentionally commenced to close the hatch cover.

Plaintiff also charged that the defendant was negligent in closing the hatch cover when plaintiff had his hand on the coaming and in failing to warn plaintiff. The trial court found defendant was negligent in these respects. Plaintiff's contentions are based upon the proposition that the longshoreman who started to close the hatch cover was an employee of the ship and, therefore, the ship is liable for this negligence.

Plaintiff has not cited any cases in which a court held longshoremen were employees of the ship and the ship was liable because of the longshoremen's negligence. We have found none and the cases to which we have been referred are to the con-

trary. Tim v. American President Lines, Ltd., 409 F2d 385 (9th Cir 1969); Kyzar v. Vale Do Ri Doce Navegacai, S. A., supra (464 F2d at 289).

Tim v. American President Lines, Ltd., supra (409 F2d at 388), distinguished the case plaintiff is relying upon, Hopson v. Texaco, Inc., 383 Us 262, 86 S Ct 765, 15 L Ed2d 740 (1966). In the Hopson case, seamen became ill in a foreign port and could not continue the voyage. The master procured a cab to transport the seamen to the office of the United States Consul as was required of him by law. The taxi driver drove negligently and injured or killed his seamen passengers. The United States Supreme Court held that the ship was liable for the taxi driver's negligence. The Court emphasized that the master selected the driver and, therefore, the ship was liable for the negligence of the driver it chose.

In Tim, as here, there was no evidence the ship selected the stevedoring contractor who employed the longshoremen; therefore, the Court in Tim held that the ship was not responsible for the negligence of the longshoremen.

Reversed with instructions to enter judgment for the defendant.

FOOTNOTE

[1] There was testimony that about half of the time the longshoremen closed the hatch without the supervision of the ship's officers. If this could be construed as creating an unseaworthy condition, it cannot be considered as the plaintiff did not charge that the ship was unseaworthy because the defendant permitted the longshoremen to close the hatch covers without supervision.

APPENDIX "B"

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

EDDO H. FEYEN, Plaintiff, vs. AMERICAN MAIL LINE, LTD., a corporation, Defendant.	No. 377 017 FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

THIS MATTER came on as an action at law before the Hon. PHILIP J. ROTH, Judge of the above-entitled court, sitting as trier of fact without a jury, on the 27th day of June, 1973, and continuing to June 28, 1973. Plaintiff appeared personally and by his attorney GARRY KAHN (Pozzi, Wilson & Atchison) and defendant appeared by and through WILLIAM F. WHITE (White, Sutherland, Parks & Heath) of its counsel. Based upon the testimony of the witnesses and the exhibits and all of the evidence in the case, the court makes the following Findings of Fact, Conclusions of Law and Judgment.

FINDINGS OF FACT

I.

At all times herein mentioned defendant was and now is a corporation organized and existing under the laws of the State of Delaware, and engaged generally in the operation of merchant vessels and commerce upon the high seas. Defendant was the owner and operator of that certain merchant vessel known as the S. S. KOREAN MAIL and was the employer of the plaintiff.

II.

At all times herein mentioned plaintiff was a member of the crew of the vessel serving in the capacity of Third Mate and while said vessel was at Keelung, Taiwan, on or about September 15, 1971, plaintiff was injured when the automatic hatch covers rolled on to his right hand while he was inspecting the No. 2 hatch.

III.

At the time and place of plaintiff's injury, defendant's vessel failed to have the hatch covers in a locked position so as to prevent them from being moved while men, such as plaintiff, were working around the hatch covers and failed to have written instructions in the control box so that the operator of the controls would know what buttons or levers to use in order to activate the top deck level hatch covers.

IV.

At the time and place the plaintiff was injured, the defendant failed to warn plaintiff of the intent to move the hatch covers while plaintiff was standing at the No. 2 hatch, allowed the hatch covers to be moved while plaintiff was standing at the No. 2 hatch with his hand in the area where the hatch covers would be moved, failed to

have the hatch covers in a locked position so as to prevent them from being moved while plaintiff was in the area of the No. 2 hatch where they were to be moved and failed to provide written instructions in the control box so that the operator could understand what button or levers to use in order to activate the top deck hatch covers.

V.

As a result of the plaintiff's injuries he sustained nervous shock, physical and mental pain and suffering, a tearing, twisting and wrenching of the structures of his right hand from which he sustained permanent scarring and some permanent injury.

CONCLUSIONS OF LAW

I.

The defendant's vessel was unseaworthy in at least one or all of the respects alleged in paragraph III in the Findings of Fact.

II.

The defendant was negligent in at least one or all of the respects alleged in paragraph IV of the Findings of Fact.

III.

Plaintiff's injuries were a proximate result of the unseaworthiness and/or negligence of the defendant above mentioned, and plaintiff is entitled to be awarded damages in the sum of $6,500.00.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

CONSIDERED, ORDERED AND ADJUDGED that plaintiff have and recover judgment against the defendant in the sum of $6,500.00 and the further sum of $_____ as costs and disbursements of the action, and that execution issue therefor.

DATED this 1st day of August, 1973.

/s/ Philip J. Roth
J U D G E

SUPREME COURT, U. S

MAY 19 1975

MICHAEL RODAK, JR., CLI

No. 74-1321

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

EDDO H. FEYEN, JR.,

Petitioner,

v.

AMERICAN MAIL LINE, LTD.,
a corporation,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

William F. White
WHITE, SUTHERLAND, PARKS & ALLEN
1200 Jackson Tower
Portland, Oregon 97205

Attorneys for Respondent

SUBJECT INDEX

Page

There is neither a substantial federal question involved nor any important reasons why this Court should hear this "garden variety" Jones Act seaman's case. 1

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Gomillion v Forsythe, (SC, 1950) 62 SE2d 297, 53 ALR2d 13, 74. 6

Hite v Maritime Overseas Corp., (ED, Texas, 1974) 380 F. Supp. 222, 1974 AMC 1274 11

Hopson v Texaco, Inc., (1966) 383 U.S. 262 3

Mastro's Case, (9 Cir., 1969) 419 F2d 143 6

Parker v Great Atlantic Tea Co., (Ind., 1956) 146 F Supp 871 9

Reinhart v United States, (9 Cir., 1972) 457 F2d 151 9

Tim v American President Lines, Ltd., (9 Cir., 1969) 409 F2d 385 3

United States v Romitti, (9 Cir., 1966) 363 F2d 662 6

Walker v Lykes S.S. Co., (2 Cir., 1952) 193 F2d 772 9

STATUTES

33 USC #902 11

33 USC #905 11

45 USC #51 4, 10

46 USC #688 11

No. 74-1321

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

EDDO H. FEYEN, JR.,

Petitioner,

v.

AMERICAN MAIL LINE, LTD.,
a corporation,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF
OREGON

There is neither a substantial federal question involved nor any important reasons why this Court should hear this "garden variety" Jones Act - seaman's case.

Respondent's ship, KOREAN MAIL, on

September 14, 1971, was loading cargo dockside at Keelung, Taiwan. Petitioner, as third mate, had the evening deck watch. It was dark, but deck lights were burning. No one was about the weather deck in vicinity of open No. 2 hatch. To see what the longshoremen were doing in the hatch, the Petitioner came up from behind and peered into the after port corner of the hatch. He placed his hand on the hatch coaming within twelve inches of a wheel to the folded McGregor hatch cover. Seconds later a Chinese longshoreman at controls on the mast house table across from Petitioner actuated the cover, causing the wheel of the cover to run forward on the coaming and roll upon Petitioner's hand. Surprisingly, little injury was sustained. It was not reasonably possible for the longshoreman to have seen Petitioner during his

fleeting moments of peering into the hatch.

The trial court found Respondent negligent. The Oregon Supreme Court reversed upon the simple proposition that there was no substantial evidence to support the trial court's findings.

The Oregon Supreme Court applied federal law and did not in any way go counter to this Court's holding in Hopson v Texaco, Inc., (1966) 383 U. S. 262. In fact, it distinguished Hopson from the case at bar for precisely the same reason that the U. S. Court of Appeals for the Ninth Circuit distinguished Tim v American President Lines, Ltd., (9 Cir., 1969, 411 F2d 381.

In Hopson the shipowner was found in the wise because his ship's master selected a taxi cab and driver in Haiti to take himself and two (2) crew members to

miles to the U. S. Consul so that the two seamen could properly sign off his ship. The cab driver negligently collided with a truck to kill the master and one seaman and injure the other. However, it was the master's selection of the negligent cab driver for purpose of carrying out the shipowner's statutory duty to have his ill seamen sign off before a U. S. Consul which caused this Court to find that the cab driver was an agent of the shipowner within the purview of the FELA, 45 USC #51. The Ninth Circuit Court of Appeals refused to apply Hopson to Tim because the evidence showed that it was the terminal operator and not shipowner who engaged the stevedore whose longshoreman negligently injured the ship's electrician. At bar the record is silent as to who engaged the shoreside stevedore, who had employed the Chinese

longshoreman that closed the hatch cover on Petitioner's hand. In the shipping industry it is as customary for cargo interests, terminal operators or ship charterers to engage stevedores as it is for the shipowner to hire such independent contractors. More probable than not it was Chiang Kai' shek's Port Authority who required his stevedores to be used by ships calling at Keelung.

By way the Petitioner has posed the question in his petition, it appears that he would like this Court in this case to turn the shipping industry on its head by applying Hopson in such a way as to make all stevedore concerns, who have traditionally operated as independent contractors, to suddenly as a matter of law become agents of shipowner for purpose of fastening liability upon the shipowner for negligence of the stevedore's employees. For several reasons

this is not the case for this Court to undertake to make any such industry-shattering extension of Hopson.

To begin with, it is a question of fact and not law as to who of several is the employer of a longshoreman. Mastro's Case, (9 Cir., 1969) 419 F2d 143. Also, the existence of an agency relationship and scope of an agent's authority is likewise a factual determination. United States v. Romitti, (9 Cir., 1966) 363 F2d 662. Whether a person (milk route driver) acts as an agent or an independent contractor most always is a question for the fact finder to resolve. Gomillion v Forsythe, (SC, 1950) 62 SE2d 297, 53 ALR2d 13, 74. Why, then, should this Court hear this case to resolve any question of law?

The trial court made no findings as to whether or not the Chinese longshoreman

or his stevedore-boss was an agent of the shipowner. In fact, it made no finding that the Chinese longshoreman was even negligent. It was not asked to do so. Both Petitioner (plaintiff) and Respondent (defendant) tried this case on Petitioner's testimony that the Chinese longshoreman was employed by a shoreside stevedore. It was not until Respondent (defendant) appealed to the Oregon Supreme Court that Petitioner for the first time raised the question it is now seeking this Court to consider.

Petitioner has even shifted his rudder since the Oregon Supreme Court. Here, he seems to be urging that the Chinese longshoreman is agent of shipowner not because the stevedore-boss was selected by the shipowner, but because he, the Petitioner, was supervising the longshoremen in approving the stow of cargo and observing the closing of

hatch covers. Of course, any deck officer worth his salt will do his duty to inspect cargo as stowed by the stevedore's longshoremen to make sure the stow is tight and safe. He will also observe the longshoremen who are closing hatch covers to make sure ship machinery is not abused and that the hatches are tightly secured for sea. Such supervision, however, is not control over the longshoremen as to how they perform their stevedore function, but rather an inspection to determine whether the shoreside stevedore has expertly performed his job for which he was contractually engaged. No one for a moment would find the Government liable for negligent acts of employees of an airplane manufacturer because it had inspectors in the plant supervising most every step in the intricate job of constructing an airplane to meet Government specifications. The

same goes for the shoreside stevedore engaged as an expert to load a vessel in a workmanlike manner.

Petitioner in his new tack gets himself into the quagmire which he was in during the trial. As officer of the deck, he conceded he was the sole representative of the master and shipowner while he had the deck watch. This being so, any causative negligence of the shipowner in this case had to be brought about, if at all, by his own acts or omissions. An injured deck officer can't fasten liability upon his shipowner boss by reason of his own negligent conduct. Reinhart v United States, (9 Cir., 1972) 457 F2d 151; Walker v Lykes S.S. Co., (2 Cir. 1952) 193 F2d 772; Parker v Great Atlantic Tea Co., (Ind., 1956) 146 F. Supp. 871.

Finally, in quest of a hearing, Petitioner seizes upon the generality that after

all the shore-based stevedore who employed the Chinese longshoreman was engaged in service of the ship and played a vital part of the ship's total operation. This may all be true, but it should not serve as an excuse to cast aside the long established principle of respondeat superior or the important distinction between an agent and an independent contractor which has so long and properly so been used to decisively determine upon whom tort liability should be vicariously placed. Certainly, Congress in its enactment of the Jones Act, 46 USC #688 which incorporated the FELA, 45 USC #51, to make the shipowner liable for the negligence of its "officers, agents or employees" did not intend to make the shipowner, ipso facto, liable for the tortious acts of employees of independent contractors. Sound law requires that an independent contractor and his employees remain as such and not be

made agents or employees of others by judicial decree merely because the word "agent" is found in an Act of Congress.

Finally, should this Court grant a writ and decide this case as Petitioner urges, a most unjust inconsistency will arise. The 1972 Amendments to the Longshoremen's Act, 33 USC #902 et seq. now leaves a very restricted remedy for the injured longshoreman against the shipowner. It is based upon common law negligence, devoid of making it the duty of shipowner to provide a safe place to work. Hite v Maritime Overseas Corp., (ED, Texas, 1974) 380 F. Supp. 222, 1974 AMC 1274. More important, where the longshoreman is plaintiff, the shipowner is insulated from any liability where the causative negligence arises from any employee who at the time was engaged in loading or discharging cargo. 33 USC #905. If Peti-

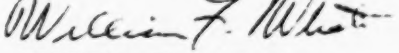
tioner as a Jones Act seaman can in the case at bar recover from his employer-shipowner because the Chinese longshoreman has by judicial decree become his employee, then the shipowner's fate will paradoxically rest upon whether the tort victim was a seagoing seaman or a shoreside seaman. What would further rub salt into the Respondent's wounds would be the fact that Petitioner himself, as he so claims, was at the time engaged in the loading of cargo.

CONCLUSION

Let the Oregon Supreme Court decision stand. It will not "eviscerate" Hopson as Petitioner claims. On the contrary, it will avoid having this Court upon a most inappropriate record undertake to decide whether or not to make a longshoreman employed by a shoreside stevedore an agent of the shipowner--a result that could only

bring consternation and havoc to an already troubled shipping industry.

Respectfully submitted,



WILLIAM F. WHITE

WHITE, SUTHERLAND, PARKS & ALLEN

Attorneys for
Respondent